SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,

Petitioners,

v.

MOBILE STEAMSHIP ASSOCIATION, INC., and ROBERT E. MALONE,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Statement

This brief is in reply only to the briefs of respondents and to those of amici curiae timely filed. We were advised telephonically by the Clerk's office on October 2, 1974, that a brief was filed on September 30, 1974 by the Solicitor General of the United States in support of respondents. As of this writing, October 3, 1974, no copy of that brief has been received by the undersigned. When a copy is received, petitioners will file and serve a supplemental reply brief.

ARGUMENT

POINT I

The dispute is preempted by the National Labor Relations Act.

A: Reliance of respondents, American employers and persons engaged in business at Mobile, Alabama, upon *Windward Shipping (London), Ltd.* v. *American Radio Association,* —— U.S. ——, 94 S. Ct. 959, as authority to exclude wholly from NLRB jurisdiction, conduct limited to peaceful picketing and pamphleting of foreign ship owner vessels by American unions requesting non-patronizing of such vessels, and which conduct allegedly, "directed employees of other employers [respondent Association, comprised of American stevedoring employers], to refuse to provide any work or services with respect to such vessels" (respondents' complaints 37a, 47a) is misplaced and in error (respondent Association's Point I).

In *Windward,* foreign ship owners sought state court injunctive relief against the aforesaid peaceful protest picketing and pamphleting. The *Windward* court recognized initially that the union's conduct there[1] did not constitute the type of interference with the foreign vessels' internal affairs, as previously found in *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138[2] or its progeny, *McCulloch*

1. The union parties and activities at bar were part of the same activities as in *Windward;* implementation of an identical program in various seaports of the United States by six national or international American unions representing merchant seamen, protesting the loss of American merchant seamen's domestic employment opportunities to foreign owned vessels and requesting such vessels not be patronized.

2. *Windward,* 94 S. Ct. at 965.

v. *Sociedad National de Marineros de Honduras*, 372 U.S. 10 and *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U.S. 24, and which led the *Benz* court to conclude that, "the ship owners' action was not preempted by the Labor Management Relations Act," *Windward* 94 S. Ct. at 963. However, the *Windward* court speculated and then concluded, that the effect of the picketing—there an appeal to American firms, their employees and other persons, not to patronize the foreign ship owners' vessels because their substandard wages and working conditions resulted in devastating damage to American merchant seamen's standards and decimation of domestic employment opportunities—would have an adverse impact upon the foreign ship owners and their foreign vessels, which might severely disrupt the maritime operations of the foreign vessels.[3] As a consequence, the *Windward* court concluded that the conduct was within *Benz* parameters, 94 S. Ct. at 965, and held that such foreign ship owners' action was not preempted by the NLRA.[4]

The *Windward* court, in its *Benz* discussion, preliminary to its conclusion based upon the economic impact aforesaid (a preemption or coverage test not previously employed), emphasized that the Act's coverage encom-

3. The *Windward* court speculated that the pickets "must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs * * *," notwithstanding no evidence or finding to support such speculation and on the contrary evidence that the express purpose was to ostracize the vessels—do not patronize.

4. As to analytical and critical comment upon the *Windward* holding and rationale, see Prof. Thomas G. S. Christensen, New York University Law School, Secretary, Section of Labor Relations Law, American Bar Association, address before Section, Hawaii Convention, August, 1974.

passed, "American workers and employees", here in the United States, 94 S. Ct. 963. At bar, the controversy over which the Alabama state courts assumed jurisdiction, and concerning which injunctive relief was granted, is not between American unions and foreign ship owners, but between American merchant seamen, their unions, American workers and the Association, its stevedoring members, American employers at the Port of Mobile, Alabama.[5]

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5. The following operative provisions of the Alabama injunction further conclusively demonstrates that the controversy over which Alabama assumed jurisdiction and issued its restraint was between American workers and employers.

1. Loitering, congregating, or picketing, by standing, walking, marching, sitting, or otherwise, at or near any part of the premises owned, occupied, or used by members of Complainant Mobile Steamship Association, Inc.

2. In any manner interfering with or obstructing, by words or actions, any person or persons working for or desiring to work for members of Complainant Mobile Steamship Association, Inc.

3. Interfering with the operations of any member of Complainant Mobile Steamship Association, Inc. in any manner whatsoever.

4. Picketing or interfering at or near Complainant Mobile Steamship Association, Inc. and its members' premises or premises used by Complainant Mobile Steamship Association's members in a manner calculated to intimidate Complainant Mobile Steamship Association's members' employees or anyone working in association with the Complainant Mobile Steamship Association's members, or any other person entering or leaving or attempting to enter or leave Mobile Steamship Association's members' premises, or calculated to induce any such persons not to report or apply for work at Mobile Steamship Association's members' premises, or any facility used by Mobile Steamship Association's members.

5. Picketing directed at vessels with whom members of the Mobile Steamship Association, Inc. have contractual relations.

6. Interfering with the contractual relations existing or to exist between the members of Mobile Steamship Association, Inc. and companies owning and/or operating vessels calling at the Port of Mobile (29a, 30a).

As *Benz* instructs, such a controversy between American workers and employers is fodder for the Act's coffers and as to which states are preempted from exercising jurisdiction. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468. State jurisdiction, opted for by respondents, of a controversy such as at hand, would lead to a variety of diverse regulation of American maritime and waterfront labor relations, particularly where some coastal states' public policy may deem the instant peaceful picketing and pamphleting "truthful and justifiable conduct", not unlawful and subject to restraint, while other coastal states may determine otherwise. In both instances, under respondents' contention, the Act would be inapplicable and a substantial part of American maritime or waterfront labor relations regulation made wholly dissimilar, a result totally contrary to and in repudiation of, Congress' expressed intent of uniform regulation of our Nation's labor relations. *Garner* v. *Teamsters Union*, 346 U.S. 485.

B: The NLRA, Section 8(b)(4),[6] places within the NLRB's exclusive domain the adjudication of conduct by American labor organizations which involves alleged in-

6. Its pertinent part provides:

"It shall be an unfair labor practice for a labor organization or its agents * * * to induce or encourage any individual employed by any person engaged in commerce * * * to engage in, a strike or a refusal in the course of his employment to * * * transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services * * * where in either case an object thereof is * * * forcing or requiring any person to cease * * * handling, transporting, or otherwise dealing in the products of any other producer, * * * or to cease doing business with any other person * * * PROVIDED, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

terference with American employers, not parties to the underlying or primary dispute. For authorities and argument in support of the foregoing, see brief of American Federation of Labor-Congress of Industrial Organizations, Amicus, Point 1(b)(c) pp. 4-12. In the interests of brevity and to avoid repetition, petitioners adopt the aforesaid cited argument. Additionally, it is re-emphasized that respondents in their state court Bills, in the gravamen of their complaints, alleged that petitioners picketed the foreign flag vessels at Mobile (37a, ¶18; 46a, ¶17) and *"also directed employees of other employers and represented by Respondents to refuse to provide any work or service with respect to such vessels"* (37a, ¶19; 47a, ¶18), and that said conduct interferred with respondents' business (37a, ¶¶20, 21; 47a, ¶¶19, 20). That is a typical allegation of "cease doing business" under Section 8(b)(4). Such allegations, involving American unions and employers, fit squarely within Section 8(b)(4)'s parameters—whose adjudication is preempted solely to the NLRB, *Garmon* and *Garner, supra.* The Alabama courts, in assuming jurisdiction of such dispute and issuing the injunction order regulating such activities (fn. 5 *supra*) trespassed upon the NLRB's exclusive domain (fn. 6 *supra*).

Nor does the fact that an underlying dispute may not be within NLRB jurisdiction, oust the NLRB's exclusive competence to pass upon conduct and its impact upon parties who are directly involved or may be affected by the dispute. In *Washington-Oregon Shingle Weavers Council,* 101 NLRB 1159 (1952), enforced 211 F.2d 149 (1954; 9 Cir.), and *International Wood Workers of America* (*T. Smith & Sons, Inc.*), 125 NLRB 209 (1959), American un-

ions with affiliates in Canada, had an underlying dispute with non-union Canadian shingle manufacturers. In furtherance of the underlying dispute with the Canadian plants and the shingles manufactured by them, the unions in the United States, at the site of an American employer, engaged in activities prohibited by Section 8(b)(4). Notwithstanding that the underlying dispute was foreign, over which the Board had no jurisdiction, the conduct complained of was domestic, involving American employers and employees, and was consequently within the exclusive authority of the NLRB. So at bar. The underlying dispute between petitioners and the foreign ship owners was held not in or affecting commerce by the *Windward* court, and thus without the NLRB's jurisdiction. Nevertheless the dispute alleged in the complaint between the respondents and petitioners, all Americans and occurring in Mobile, Alabama, and adjudicated by the Alabama courts, is domestic, in and affecting commerce, and within the NLRB's exclusive competence.

Similar to the foregoing are the Courts of Appeal authorities, *Madden* v. *Grain Elevator Workers Local 418*, 334 F.2d 1014 (7 Cir.), cert. den. 379 U.S. 967 and *Grain Elevator Workers Local 418* v. *NLRB*, 376 F.2d 774 (D.C. Cir.), cert. den. 389 U.S. 932, cited and discussed in our main brief, pp. 17, 18 and brief of Amicus AFL-CIO, pp. 6-9. There, the underlying dispute was Canadian involving a Canadian ship owner and Canadian unions, as in *Benz, supra,* not within the Board's competence; the conduct complained of, however, and as to which the NLRB assumed jurisdiction, was domestic, involving American unions, workers and employers, occurring within the United

States and within the interdiction of Section 8(b)(4). Identical thereto is the respondents' complained of conduct at bar; while the underlying dispute is with foreign ship owners, however the acts allegedly engaged in by American unions and workers at Mobile, Alabama involving American employers was within the letter and spirit of Section 8(b)(4). Such dispute is cognizable solely by the NLRB, *Garner, supra.*

Respondent Association's explanation of the dispute in *Grain Elevator* and *Madden, supra* (Association brief p. 22), fails to surface all the facts. As revealed by the NLRB's decision (155 NLRB 402) enforced and/or affirmed by both Circuits aforesaid, and specifically by the Board's Trial Examiner's Intermediate Report, *id.* at 417 *et seq.*, adopted by the Board on the issue present, the Canadian affiliate of an American based union had an underlying dispute with a Canadian ship owner and another Canadian union, as to the representation of seamen aboard Canadian flag vessels. Such dispute resulted in picketing in American ports by the American union and its Canadian affiliate which was thereafter enjoined. Simultaneously the Canadian union requested and induced another American union, the Grain Handlers, not to work upon the Canadian vessels, the subject of the underlying Canadian dispute. Thus, the dispute over which the Board assumed jurisdiction, and concerning which both Courts of Appeals aforesaid held to be within the Act's scope and not under the *Benz* holding and its progeny, was concluded to be a domestic dispute between an American union, the Grain Handlers and its members and their American employer; this notwithstanding that the underlying dispute, into

which the American union of Grain Handlers had injected itself, was not in or affecting commerce and was consequently without the Board's jurisdiction. Again, so at hand. Although petitioners' underlying dispute with the foreign ship owners has been determined by *Windward* to be not "in commerce" under the *Benz* rationale, respondents' complaints, however, allege and constitute a domestic dispute between American unions, employees and employers exclusively within NLRB jurisdiction.

Respondent Association's argument and analysis of the thrust of this Court's holding in *Local Union No. 25* v. *New York, New Haven & H.R. Co.*, 350 U.S. 155, at pp. 20, 21 of its brief, purportedly in reply to petitioners' argument that NLRB exclusive jurisdiction prevails as to other persons or domestic employers, notwithstanding that the underlying object of the union's activities are directed at an entity without the Act's coverage, constitutes a misreading of this Court's decision. The pith, substance and rationale of *Local Union No. 25* was pointedly emphasized in the following:

> "Under the Board's Rules and Regulations such a charge may be filed by 'any person.' We think it clear that Congress, in excluding 'any person subject to the Railway Labor Act' from the statutory definition of 'employer,' carved out of the Labor Management Relations Act the railroads' employer-employee relationships which were, and are, governed by the Railway Labor Act. *But we do not think that by so doing Congress intended to divest the N.L.R.B. of jurisdiction over controversies otherwise within its competence solely because a railroad is the complaining party.*" (350 U.S. at 160, emphasis supplied)

Similarly, where, as at bar, the underlying dispute is not in or affecting commerce, it does not follow that the NLRB is divested of jurisdiction over controversies *otherwise within its competence.* As we have demonstrated, *supra,* respondent American employers' alleged dispute is with American unions and employees at Mobile, Alabama, conduct exclusively within the NLRA competence.

C: Respondent Association's reply (Association brief pp. 17-9) to petitioners' argument, that *Windward* left unanswered the question of NLRB preemption of union conduct similar to *Windward* with respect to the American-owned vast fleets of foreign flag vessels, registered in Panama, Liberia or Honduras, under a defined category of "effective U.S. control" and which are deemed constructively American, pursuant to American law, 46 U.S.C. §§1242(a), 1283(a) and 46 C.F.R. 308:1-308:536 (petitioners' main brief p. 18 fn.5), misreads the *Windward* rationale.

The *Windward* court, in concluding that the facts there fell under the *Benz* holding (not preempted conduct), rather than under *International Longshoremen's Local 1416* v. *Ariadne Shipping Co.,* 397 U.S. 195 (preempted conduct), discussed and analyzed the concerns which prompted its conclusion. Such concerns were that "a large scale increase in [the foreign ship owners] operating costs [constitute] more than a negligible impact on [its] maritime operations" (94 S.Ct. at 965) and that,

> "In this situation, the foreign vessels' lot is not a happy one. A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and

far reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in foreign ports might likewise be considered, but the employment of such tactics would probably exacerbate and broaden the present dispute." (94 S. Ct. at 965)

Patently the foregoing underpinning for the *Windward* holding of necessity requires investigation of the facts relative to the foreign ship owner as the competitor who has substantially destroyed the domestic employment opportunities of American merchant seamen. For, if the competitor is not the regularly understood foreign ship owner, but instead an American with a foreign facade, whose foreign vessels under the aforesaid 3-Nations flags are in fact and substance, by virtue of American law, effectively American ships, and if such arrangement is with the knowledge and consent of the aforesaid foreign nations, then certainly, the *Windward* concerns of retaliatory action and probable exacerbation and broadening of the dispute is without substance and ephemeral. Similarly, *Windward* concerns for "private balance sheets of foreign ship owners" would be without basis or justification if it appears that in reality they are American owned major petroleum and multinational corporations engaging in our seaborne trade. We know of no authorities holding, and we do not believe any exist, that the reach of a Congressional Act shall be determined by judicial concern for the financial weal of major private U.S. corporations.

The test for preemption is not that of "balancing of contacts" as respondent Association suggests (Association brief pp. 18, 19). To the contrary, it is the *Windward* court's expressed concerns for the foreign ship owners and the consequences to the foreigner. We reiterate, the test is the foreign identity of the competitor, and the facts surrounding such competitor against which the *Windward* expressed concerns are to be evaluated and their application determined.

As to the Association's contention that *McCulloch, supra,* finally settled the utilization of "balancing of contacts" theory, we cite this Court's recent decision in *Hellenic Lines Limited* v. *Rhoditis,* 398 U.S. 306, where the same contention as that raised here by respondents was raised by the *Hellenic* minority (398 U.S. at 312), but not accepted by the Court.

POINT II

The questions presented by the petition for a writ of certiorari are ripe for adjudication.

Both respondent Association (brief pp. 23-27) and its Amicus, Westwind Africa Line, Ltd. (brief pp. 5, 6), contend that absent final judgment, the questions presented should not be considered. Such contentions are erroneous.

The Alabama Supreme Court in its opinion, premised upon this Court's holdings in *Benz, Incres* and *McCulloch, supra,* concluded that the NLRA was inapplicable, because the case concerns "matters affecting international rela-

tions and not properly for NLRB jurisdiction" (14a). Such findings and conclusion of law, notwithstanding that it was contained in an affirmance of a preliminary injunction, is nevertheless final. Such jurisdictional question, determined by Alabama's highest court, "has been finally determined by the judgment below and is not subject to further review in the (Alabama) state courts", *Local No. 438 Construction & General Laborers Union* v. *Curry*, 371 U.S. 542, 549, 550. Consequently, no subsequent hearing on the issuance of a permanent injunction will change such determination in the Alabama trial court.

The requisite finality under 28 U.S.C. §1257 exists, as such judgment constitutes, "a final and erroneous assertion of jurisdiction by a state court to issue a temporary injunction in a labor dispute, when a substantial claim is made [as we make in Point I, *supra*], that the jurisdiction of the state is preempted by federal law and by the exclusive power of the National Labor Relations Board," *Curry*, 371 U.S. 542, 552.

In addition to its final determination of the issue of preemption, the Alabama Supreme Court has determined that the exercise of First Amendment rights by peaceful picketing and pamphleting may be summarily and totally prohibited, pending ultimate, if not delayed, resolution of the issues, solely because of the adverse economic effect of the picketing and pamphleting (19a). Such determination is equally final. Furthermore, the Alabama Supreme Court has determined that the purpose of petitioners was probable wrongful interference with the business of loading and unloading ships (25a, 26a). This was premised solely upon a personal hope of an administrative functionary of

petitioners, to effectuate a personal purpose other than that of the petitioners (126a, 130a). He was without any authority to vary petitioners' specific instructions (142a), but was solely authorized to maintain the picket line in conjunction with others (143a); that personal hope of this individual has now been constituted as the petitioners' purpose and object so as to convert their national lawful picketing purpose and conduct, to one of intended probable wrongful interference with a person's business.

Lastly, the Alabama Supreme Court held that wrongful interference with an Alabama resident's business, notwithstanding the vagueness of the term "wrongful", justifies the total restraint of picketing, of publicizing and/or of informational picketing by labor organizations (20a), cf. *Organization For a Better Austin* v. *Keefe*, 402 U.S. 415.

The totality of the foregoing, aside from preemption, is that "nothing more of substance (is) to be decided in the trial court"—consequently the judgment is final for this independent reason, *Curry, supra* at 550, 551, *Keefe, supra* at 418. In result, the federal questions, "have reached a definitive stop". *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71. Under this posture the controlling question is a federal one with nothing more to be decided below. *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 739. Finally, where as here, the Court upon well founded jurisdictional ground has the case before it, it is empowered to decide the entire controversy, *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 629.

POINT III

Petitioners' First Amendment rights have been unlawfully abridged.

A: As found by the Alabama Supreme Court, petitioners' mute pickets picketed and distributed pamphlets at the site of the two foreign ship owner vessels at Mobile and then reduced their picketing and pamphleting to one of such vessels, the Liberian vessel AQUA GLORY (6a, 7a). Such direct picketing and pamphleting caused persons not to work upon the picketed vessels. In affirming a temporary injunction the Alabama Supreme Court initially concluded that:

> "We feel the Circuit Court in Mobile County could validly consider the economic effects of the picketing at the particular time the dispute was in progress and issue its order ceasing all picketing until the underlying questions could be resolved without unlawfully interfering with appellants' rights to express themselves on the disputed issue." (19a)

Summarily destroyed upon the altar of economics was petitioners' First Amendment guarantee of free speech, recognized as having such "an important role * * * in labor disputes", *Allee* v. *Medrano*, —— U.S. ——, 94 S.Ct. 2191, 2207, to truthfully and peacefully publicize the issues of a labor dispute and request persons not to patronize the picketed entity, is conduct protected by the First and Fourteenth Amendments, *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza*, 391 U.S. 308, 313.

We know of no prior decision of this Court, nor have the Alabama Supreme Court or respondents cited any

decision, which permits a state to so arbitrarily vitiate such constitutional rights as Alabama has done, on the naked ground that there is a "valid state interest in the preservation of its local economy".

This Court in *Teamsters, etc.* v. *Vogt, Inc.*, 354 U.S. 284, concluding that under certain circumstances states may restrain picketing, specifically cautioned:

> "Of course, the mere fact that there is 'picketing' does not automatically justify its restraint without an investigation into its conduct and purposes. State courts no more than state legislatures, can enact blanket prohibitions." (354 U.S. at 294, 295).

By its action aforesaid, Alabama has employed the proscribed procedure of enacting blanket prohibitions preliminary to any investigation resolving the underlying issue as to the picketing conduct or its purposes, and the exercise of most valuable First Amendment rights of American merchant seamen have been unlawfully restrained. Such state conduct, as the foregoing authorities instruct, patently is an abridgment of First and Fourteenth Amendments strictures.

B: At issue is a substantial constitutional claim, the guarantees of the Bill of Rights, the freedom of expression of petitioners and their thousands of American merchant seamen upon an issue of most vital significance to them and the Nation. This Court has the power to search the Alabama state court record to assure that such valuable rights have not been "defeated by insubstantial findings of fact, screening reality". *Local Union No. 10, etc.* v. *Graham*, 345 U.S. 192, 197.

The Alabama Supreme Court (23a, 24a), respondents and their Amici, in support of the injunction, and notwithstanding that there were no findings by the trial court, rely exclusively upon portions of the testimony of the witness Niera, a low-level local administrative representative of one of the six national and international union petitioners.

The reliance is upon his recitation, not of the petitioners' picketing object and purpose, but instead upon his personal hopes and desires so as to "find" the purpose and objects of petitioners' conduct. (Respondent Association brief pp. 34, 35, 44, Amicus Westwind p. 10.) However as *Graham, supra,* mandates, the search of the state court record illustrates the error at bar, for it demonstrates the reality of the events and the absence of any basis for finding that Niera's personal hopes and desires were the Committee's or the petitioners' purposes and object.

As both this record and the *Windward* record demonstrate, the six petitioners, national and international unions, after careful review and deliberation, determined to take specific collective action through a nationwide program to protest the loss of their members' domestic employment opportunities to foreign ship owners' vessels engaged in the carriage of American sea-borne commerce. To that end they formed a Committee and determined their policy, program, object and purpose. (94 S. Ct. at 961, 962, 6a, 7a.)

That Committee prepared the picket signs and leaflets for distribution by mute pickets with specific written instructions which were delivered by Committee representa-

tives to ports where picketing was to be conducted (91a, 107a, 108a, 113a). The instructions (113a) pointedly recited the object and purpose of the petitioners, to wit,

> "Your Union, along with other American Maritime Unions, has formed a Committee, to protest the loss of jobs to Foreign Flag operators transporting American Commerce and who operate such vessels at wages and benefits substandard to those enjoyed by American Seamen.
>
> "In support of this protest, these Unions are setting up publicity picketing around such Foreign Flag Vessels in American Ports.
>
> "Our organization will participate in carrying out this publicity picketing.
>
> "In connection with this activity, if the publicity picketing is to take place in your Port, the following instructions must be followed to the letter.
>
> "1. If the vessel is at a Terminal and access cannot be had alongside the vessel, request must be made to the Terminal operator for the opportunity to picket alongside the vessel. If this request is denied, picketing is to take place at the entrance to the Terminal. Make a memorandum of your conversation with the Terminal operator.
>
> "2. There should be no more than 4 pickets at any one site, at any one time. Pickets must be instructed that all picketing must be peaceful and they must ignore any acts of provocation. Picket signs with the correct language will be furnished to your Port.
>
> "3. Your Port will be furnished with leaflets. All pickets are to carry a sufficient amount of leaflets which they will distribute as they picket. Pickets must be clearly instructed that under no cir-

cumstances should they speak to anyone, and in answer to all questions, they are merely to hand the person a leaflet.

"4. If anyone asks you, as Port Agent, or asks the pickets whether they should cross the picket line, no answer should be given, but instead the person should be handed a leaflet.

"5. In response to any inquiries, from other Unions, to you or your representative at your Port, refer them solely to the language on the picket sign and give him a copy of the leaflet. Do No More. If any of the pickets are served with a legal paper, they are to call your Union Office immediately. They are not to speak to anybody else. In the event legal papers are served, you must notify your headquarters immediately.

"6. Any and all inquiries directed to you from the Press or anybody else, should be referred to your Headquarters. Do not engage in any conversation with such persons.

"7. No one has authority to change these instructions except upon specific written authority from your Headquarters."

Niera's sole function was to carry out the Committee's instructions as a local representative of one of the six petitioners, as the aforesaid instructions made indubitably clear. Admittedly he had "no authority other than I put pickets out on the picket lines in cooperation and in conjunction with the people that work with me" (143a); in fact, as a local official of one of the petitioner unions, he was subordinate to Mr. Chuck Molloy, the local coordinator; that Niera and others were "to receive our instructions, and information comes through Mr. Molloy who acts as the

coordinator for this particular situation we've got here in Mobile" (141a, 142a). Further, admittedly, Niera had no authority to vary petitioners' specific aforesaid instructions (126a, 130a, 142a), which in conjunction with the prepared and authorized picket signs and pamphlets used, made crystal clear that the petitioners' purpose or object was to have the foreign ship owners vessels ostracized—not to be patronized. There was no evidence that the Committee's purpose or object was to "clutter up the port of Mobile—to bring sufficient pressure on the U.S. Government to do something about the American merchant marine or shut the whole State Docks down" (24a). Such was *solely* the personal hopes and desires of Niera, the low-level administrative functionary whose duty and authority was merely to carry out prescribed and limited and perfunctory picketing duties.

The foregoing constitutes the *Graham* task of searching the record. We respectfully submit that nothing contained in Niera's testimony could conceivably constitute substantial or adequate findings as to the petitioners', as distinguished from Niera's personal, purpose and object, so as to warrant or justify abridgment of the exercise of guarantees contained in the Bill of Rights by tens of thousands American merchant seamen. As *Graham, supra,* requires, "guarantees of the Bill of Rights [may not] be defeated by insubstantial findings of fact",[7] a mandate disregarded by the Alabama courts at bar.

C: The Alabama Supreme Court indicates that peaceful and truthful picketing, which wrongfully interferes with a person's business will be restrained. However, as this

7. In fact, the trial court made no findings of fact (20a).

Court has repeatedly stated, picketing is "expressive conduct" within the protective mantle of the First Amendment, *Logan Valley, supra,*[8] *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, 99, and when states reach out to regulate such picketing conduct, the exercise must be as a necessary step to the realization of a "valid state policy in a domain open to state regulation," *Vogt,* 354 U.S. at 291. Here, through the use of the term "wrongful interference", without defining with clear and precise enumeration what is wrongful, Alabama has not manifested the necessary allegiance to and protection of, constitutional guarantees of free speech. Such valuable rights and their zealous protection, mandate standards the most exact and clear, before their regulation may be undertaken, *Thornhill* v. *Alabama,* 310 U.S. 88; *Carlson* v. *California,* 310 U.S. 106. Under the determination below, each Alabama trial judge and subject to human predilections, is left to determine whether or not the picketing conduct is wrongful—a result similar and analogous to the prohibited procedures of blanket state prohibitions of peaceful picketing, *Vogt, supra.*

Misplaced is the reliance by the Alabama Supreme Court, respondents and their Amici upon *Vogt, supra,* and

8. To distinguish *Logan Valley,* respondent Association (brief, pp. 35, 36) and its Amicus Westwind (brief, pp. 9, 10) contend that the union picketing there was directed to consumers and not to Union members and confined solely to the pick-up area frequented by customers. The *Logan Valley* record demonstrates otherwise. The *Logan Valley* pickets, carrying picket signs, handed out leaflets reading, *inter alia,* "We appeal to our friends and members of organized labor Not to Patronize this non-union market" (Union brief, p. 7, Record 89, 102), and the picketing took place in the pick-up area and in front of the supermarket (Union brief, p. 5, Record 89), conduct identical to petitioners' pickets at bar. [References to Record and Union brief are to *Logan Valley* record and filed briefs].

this Court's prior decisions in *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490; *Hughes* v. *Superior Court of California*, 339 U.S. 460; and *International Brotherhood of Teamsters Union* v. *Hanke*, 339 U.S. 470. In each of those cases there was a specifically delineated and defined valid state policy directed at a substantive evil, *e.g.*, monopolistic practices, racial quota hiring, and avoidance of forced union shop provisions. However, at bar, we are advised of no specific Alabama state policy the validity of which can be evaluated by any of the tests approved by this Court. Under the generic postulation, "wrongful", picketing which disturbs the privacy of an Alabama resident's home where he may also be transacting business, may be deemed by Alabama courts as wrongful interference and thus restrained, notwithstanding this Court's recent determination that such a state policy may not be utilized to abridge First Amendment rights, *Keefe, supra.* We respectfully submit, that the mandate that a state may not regulate peaceful picketing, the exercise of a First Amendment right, unless it first demonstrates that it has met in all respects, the aforesaid *Vogt* test of a valid state policy in a domain open to state regulation to correct demonstrated substantive evils,[9] may not be replaced by the vague and casual test opted for by the Alabama courts.

Both respondent Association and its Amicus, *Westwind*, constantly intone the old and as we demonstrate *infra*, the out-moded shibboleth, that a peaceful union picket line constitutes a coercive signal for economic action by union members and is consequently not entitled to the complete

9. *Cf. N.A.A.C.P.* v. *Button*, 371 U.S. 415; *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1; *United Mine Workers of America, District 12* v. *Illinois State Bar Assn.*, 389 U.S. 217.

guarantees of the First Amendment (Association brief pp. 30-33; Westwind brief p. 7). Such shibboleth is premised upon determinations made more than a score and a half years ago[10] and repeated and paraphrased notwithstanding that experience, legislation, mores and societal evaluations have undergone critical changes so that the underpinning no longer exists for the conclusion that a peaceful picket is a coercive signal.

The concept of a coercive signal was premised upon the development of labor organizations within the framework of then existing legislation and societal views. Unions under the legislative permissiveness of the Wagner Act, strengthened the institution, originally conceived by the craft unions, of the closed shop with the concomitant power to regulate the right of a worker to secure and retain a job. The adoption of union rules or policies with the power to discipline, including the power to force termination of employment, were lawful and not unusual. The administration of such rules and policies were thought to bring about heightened bureaucratic arrogance. It was thought by many that the totality of the foregoing gave to the picket line an economic sanction imposed by bureaucratic forces, thus the euphemism "signal".

We do not necessarily subscribe to the rationale or reasonableness of the view held by many of the significance of the "signal". Other societal views as to institutional values for the Nation might outweigh the alleged coerciveness of the signal. However, such balancing is totally irrelevant to the issue here. Congress, acting upon its

10. *Bakery & Pastry Drivers* v. *Wohl*, 315 U.S. 769, 776, 777 (1942).

experience with the Wagner Act, has cut the ground from under the "signal" doctrine. It has long since been eroded or changed, although the old shibboleth, no longer anchored to its purpose, continues in orbit.

Congress, in amending the Wagner Act, outlawed the closed shop and permitted, subject to state policy, a much lessened degree of union security,[11] and limited the power of unions to terminate an employee's employment or otherwise to discriminate, for reasons other than "failure to tender periodic dues and the initiation fees uniformly re-

11. Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employers eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

quired as a condition of acquiring or retaining membership".[12]

The alleged coercive effects and bureaucratic powers constituting the underpinning for the signal doctrine no longer exist. An employee's sole obligation as a condition of his employment is solely to meet the regular dues and initiation fee obligations, *Scofield* v. *NLRB,* 394 U.S. 423, 429, fn. 5; *NLRB* v. *Allis-Chalmers Manufacturing Co.,* 388 U.S. 175, 196. If the employee is a member of a union and is dissatisfied with union policy and unable to change it, he may exercise his free choice to resign from the union and not be subject to contractual requirements of the union's constitution and by-laws[13] and merely tender the dues and initiation fees, *Allis-Chalmers,* 388 U.S. at 196. In all respects, by the NLRP as amended, the choice to respect or honor another labor organization's peaceful picket line, rests solely with the individual employee's voluntary action. He cannot be coerced. He has a free choice as an individual to determine whether he is in accord with the expressions of the pickets. The picketing then is a fundamental exercise of First Amendment rights; it is an appeal for voluntary action by persons in sympathy

12. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

13. *International Association of Machinists* v. *Gonzales,* 356 U.S. 617, 618.

with the ideas expressed. Most significant, under the amended NLRB,[14] no person in Alabama is required to even make the tender of dues or initiation fees.[15] The alleged predetermined coercion and bureaucratic excesses underlying the signal concept is now totally absent and in place is the purely voluntary action of the individual.

The voluntary action of working people, union members and others[16] who philosophically or economically happen to be in accord with the peaceful protest picketing and the message thus being imparted, such as at bar, is no less a protected exercise of free speech, than when members of a religious order, racial, feminist or similar groups, whose allegiance to or agreement with the group's dogma, impels their action jointly or in conjunction with others, and results in adverse economic impact upon a picketed entity, *Keefe, supra.*

The contrived or now inapplicable rationale to regulate free speech—the "signal" shibboleth—should, we submit,

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14. The Act's Section 14(b) provides:

"Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

15. *Alabama Laws, Title 26, Sec. 375(1) et seq. Right to Work Law-Declaration of Policy*—it is hereby declared to be a public policy of Alabama that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. * * *

16. At bar the pickets' message was communicated to all persons, not only union members. In fact union members constitute only a minority of 24.3% of the Nation's almost 89,000,000 working people. See Bureau of National Affairs, August 21, 1973, Daily Labor Report No. 162—Table I of the total labor force and percentage of union members.

be evaluated in light of recent legislation and experience. We further submit that they impel the shibboleth's discard. The "workingman's means of communication", *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287, the truthful picket line, limited to the parameters of the dispute, the permissible area of contest open to the industrial combatants, *Thornhill,* 310 U.S. at 103, 104, is protected fundamental exercise of a right guaranteed by the Bill of Rights and inviolate from state regulation. And the fact that the exercise of free speech at such permissible areas causes substantial adverse economic impact does not lessen the First Amendment's protective mantle, *Schneider* v. *Irvington,* 308 U.S. 147, 163.

Conclusion

The decision of the Alabama Supreme Court should be reversed with a direction to dismiss the complaints.

Respectfully submitted,

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